

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Adv. Case No. 08-01789-brl

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5 In the Matter of:

6  
7 SECURITIES INVESTOR PROTECTION CORPORATION,

8 Plaintiffs,

9 v.

10 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC, ET AL.,

11  
12 Defendants.

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16 U.S. Bankruptcy Court

17 One Bowling Green

18 New York, New York

19  
20 June 19, 2012

21 11:05 AM

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23 B E F O R E :

24 HON BURTON R. LIFLAND

25 U.S. BANKRUPTCY JUDGE

1 HEARING RE: Picower Class Action Plaintiffs for a  
2 determination that the Commencement of the Securities Class  
3 Action Lawsuits Against Non-Debtor Parties is Not Prohibited  
4 by a Permanent Injunction Issued by this Court or Violative  
5 of the Automatic Stay (HOLDING DATE)

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25 Transcribed by: Nicole Yawn

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P R O C E E D I N G S

THE COURT: Be seated, please.

Yeah. Madoff?

UNIDENTIFIED SPEAKER: Madoff.

THE COURT: Okay.

MR. SCHMIDT: Good morning, Your Honor. Frederick Schmidt, from Herrick, Feinstein, counsel for A & G Goldman and Pamela Goldman.

MR. STONE: Richard Stone, also counsel for the Goldmans.

MR. ALKIN: Joshua Alkin, also (indiscernible - 00:33:05:).

MR. SHEEHAN: Good morning, Your Honor. David Sheehan, from Baker Hostetler, for the trustee.

MS. COLE: Tracy Cole, also from Baker Hostetler.

THE COURT: Go ahead.

MR. SCHMIDT: Thank you, Your Honor. First of all, I'd -- I'd like to thank Your Honor for accommodating us and bringing us in at 11:00. One of our counsel was flying up from Florida, and this enabled him to come up this morning, rather than having to come here last night.

Your Honor, we're here to seek an order from Your Honor that our class action, securities law class action, yet to be filed that we intend to file in the Southern District of Florida, does not violate Your Honor's permanent

1 injunction that was contained in an order dated  
2 January 13th, 2011.

3 THE COURT: Oh, by the way, in the interim, since  
4 I did accommodate you with that extra hour, I repaired to  
5 chambers between matters, fired up the computer, and guess  
6 what I saw? First thing on my screen. Court of Appeals  
7 dismissing the Fox/Marshall matter, which figures very  
8 prominently in today's hearing.

9 MR. SCHMIDT: I didn't see that, Your Honor,  
10 because we were on the subway on the way down.

11 (Laughter)

12 THE COURT: Well, I didn't see it until I just  
13 accommodated you.

14 MR. SCHMIDT: But, in -- in any event, Your Honor,  
15 as -- as I'll get into, we don't believe that the -- the Fox  
16 and the Marshall matter is -- is particularly important in  
17 this. It's certainly not the same claim. They're --  
18 they're vastly different claims, and, quite frankly, we have  
19 no issue with the -- the decisions that were reached in the  
20 Fox/Marshall appeals.

21 Again, our claim is completely different. It's  
22 completely premised on federal securities law, so we have  
23 different damages. We have different injuries. The -- the  
24 claims accrued at different times. The Fox/Marshall claims  
25 were based on RICO and similar state law conversion, unjust

1 enrichment, conspiracy, things that the estate really would  
2 have the same claim on. They would be derivative. They  
3 would be duplicative of what the trustee would be able to  
4 bring on behalf of the estate.

5 In contrast, our claims are premised on federal  
6 securities law, the -- the Exchange Act of 1934. We are  
7 asserting claims under 20(a), which provides for control  
8 person liability. The class action complaint that we intend  
9 to file --

10 THE COURT: Picower being the control person?

11 MR. SCHMIDT: Picower being the control person.

12 That's correct, Your Honor.

13 The complaint that we would like to file alleges  
14 that the commingled discretionary securities trading account  
15 that -- that BLMIS -- BLMIS, Bernie L. Madoff Securities,  
16 Inc., is a separate security. So, when people invested in  
17 that, they were, in essence, purchasing a security.

18 I don't think that it's very controversial that  
19 BLMIS clearly committed securities frauds on a number of  
20 people, and, but for the SIPRA (ph) proceeding, there would  
21 be a multitude of lawsuits seeking to hold BLMIS in -- in --  
22 or seeking to hold BLMIS liable for those violations. Here,  
23 we're seeking to go after Picower, which is a third party,  
24 non-debtor defendant, and the control person liability,  
25 under 20(a), reads as follows.

1 "Every person who directly or indirectly controls  
2 any person liable under any provision of this chapter or of  
3 any rule or regulation thereunder shall also be liable  
4 jointly and separately with and to the same extent as such  
5 controlled person to any person to whom such controlled  
6 person is liable." Here, the controller is the Picower  
7 defendants. The controllee was BLMIS.

8 This type of claim cannot be derivative or  
9 duplicative, and -- and those words I use, because they were  
10 contained in Your Honor's permanent injunction. No claim  
11 can be brought against a third party under that injunction  
12 that is either derivative or duplicative of claims that the  
13 trustee brought or the trustee could have brought.

14 Here, these securities law claims are neither  
15 duplicative nor derivative. First of all, the trustee lacks  
16 standing to bring -- to assert the securities claims,  
17 because BLMIS was neither a -- was -- was not a purchaser of  
18 its own securities. It was a seller, but it wasn't a  
19 purchaser, and it didn't incur any damages as a result of  
20 its sale.

21 Under the Blue Chip Stamps v. Manor Drug Stores,  
22 which is Supreme Court case 421 U.S. 723, the Supreme Court  
23 stated that only purchasers and sellers of -- of securities  
24 had standing to bring actions under 10(b), 10(b)(5), and, by  
25 extension, 20(a) of the Exchange Act. We cite several other

1 cases in our brief for -- for that proposition.

2 Here, BLMIS clearly didn't purchase its own  
3 securities, and, when it sold its own securities to  
4 defrauded investors, it actually received a benefit. It  
5 received a cash-in to perpetrate and -- and -- and continue  
6 its scam, and, while that may be harmful for the company in  
7 the long-term, there are -- there's ample case law that  
8 says, in the short-term, there is a benefit that's given to  
9 the corporation in that regard.

10 So it didn't suffer any damages as a seller, and  
11 it wasn't a purchaser. So therefore, it wouldn't have  
12 standing to assert a 20(a) claim or a federal securities  
13 claim.

14 We've also cited numerous cases in our reply brief  
15 and our brief -- original moving brief, which establish that  
16 federal securities law claims belong to the shareholders.  
17 They don't belong to the corporation or, by extension, a --  
18 a trustee that sits in a corporation's shoes, and, just very  
19 briefly, we cite the Seven Seas Petroleum case, Fisher (ph)  
20 v. Apostelu (ph), Reliance Acceptance Group, Farmmore (ph)  
21 Security -- Farmmore, Inc., Oaks v. Lipson (ph) and Granite  
22 Partners, and, last but not least, Hirsch v. Arthur  
23 Andersen, which was a 2nd Circuit case in 1995, where the  
24 trustee sued the accountant, the debtors' former accountants  
25 under a securities law basis, and, at least on the piece



1 where the trustee had sued based upon the accountants'  
2 distribution of misleading offering memoranda, that was  
3 clearly, the 2nd Circuit said, the province of shareholders,  
4 and the trustee didn't have standing to -- to assert those  
5 claims.

6 Next, Your Honor, a section 20(a) claim, by its  
7 terms, cannot be derivative. Under 20(a), a plaintiff must  
8 show that there's a primary violator. Here, primary  
9 violator is clearly BLMIS, and you cannot sue derivatively  
10 on behalf of that primary violator. We've cited to the --  
11 the Maxim Integrated Products case and the VeriSign case for  
12 that proposition.

13 The trustee has asserted an opposition to -- to  
14 our motion, and, as -- as we read it, it's premised solely  
15 on the argument that his fraudulent -- his avoidance  
16 actions, the trustee's avoidance action that he asserted  
17 against the Picower and defendants, is essentially the same  
18 as our securities law claims. Again, going back to -- to  
19 what I've just been over, the trustee wouldn't have standing  
20 to assert those, so that's clearly not the case.

21 But, when you take a look at really -- and you dig  
22 down and see what these claims are, it's clear, and it's  
23 apparent that the securities law claims are not the same as  
24 the avoidance action claims that the trustee asserted. The  
25 trustee asserted that the Picower defendants received \$7.2

1 billion in fraudulent transfers during the course of the  
2 case.

3 In contrast -- and so, his damages were the \$7.2  
4 billion. All the money that came out of the estate and went  
5 to the Picower defendants, the \$7.2 billion, were the  
6 damages, and that was the extent of the damages in that --  
7 in that action.

8 In contrast, the -- the -- the securities claim  
9 seeks damages which are calculated by the difference that  
10 they actually paid for the securities as opposed to what  
11 they were worth. Had the securities law violations not been  
12 apparent here or had they been disclosed, clearly, what they  
13 invested would have been much less, in terms of value, than  
14 what the -- the actual value of the -- the security was.

15 There were different injuries. The damages to the  
16 class action claims are based on the failure of the Picower  
17 defendants to make disclosures and to otherwise supervise  
18 and prevent the fraudulent sale of securities. Whereas, the  
19 trustee's claims were the -- for the return of monies that  
20 were fraudulently transferred.

21 They accrued at different times. The fraudulent  
22 transfer claims accrued every time money went out from BLMIS  
23 to the Picower defendants. Our -- our claims accrued when  
24 the -- each investor purchased its -- it's own security.

25 The trustee seeks to combine or conflate the two

1 claims by saying, well, if you look at the class action  
2 complaint, it's replete with the allegations that we made in  
3 our fraudulent transfer action, and, certainly, when you do  
4 look at the complaint, that's in there. However, the  
5 fraudulent transfers were the whole reason for the trustee's  
6 complaint. The fraudulent transfers, in contrast with --  
7 with our complaint, are merely evidence of the Picower  
8 control over the debtor, and that's a necessary element  
9 under 20(a).

10 It's not the whole reason. It's not the entire  
11 claim that we have, and it -- it -- it is merely a single  
12 element. The trustee's claim couldn't survive without those  
13 allegations. Our claim could, and we've cited numerous  
14 cases that say, while the existence of common facts and  
15 common defendants does not necessarily or does not bestow  
16 standing on a trustee to assert a claim that belongs to  
17 shareholders, and, again, I cite the Seven Seas Petroleum,  
18 Fisher and Apostelu, and Reliance Acceptance Group for that  
19 proposition.

20 The trustee also argues that St. Paul Marine v.  
21 PepsiCo, the 2nd Circuit case from a few years back, brings  
22 our claims within the ambit of the trustee's jurisdiction,  
23 and that case said the claims must be property of the debtor  
24 under state law, and the creditor must not be able to allege  
25 any direct injury traceable to the non-debtor third party.

1 If those two elements are -- are met, then the trustee would  
2 be permitted to assert the claims, and the -- the -- the  
3 third party would not be able to be sued by the harmed  
4 investors outside of the estate.

5 Here, however, we have claims that aren't shared  
6 by the estate, because the trustee doesn't have standing to  
7 assert the claims. They're different claims. St. Paul was  
8 different. St. Paul was an alter ego claim, and the 2nd  
9 Circuit went through an analysis that said, "Well, in this  
10 case, both the estate and the corporation had an alter ego  
11 claim, and so did the -- the shareholders and the  
12 investors."

13 But here, there is no shared claim. The trustee  
14 simply doesn't have standing to assert the claim, and  
15 securities law claims belong only to the purchasers of the  
16 securities. Also, BLMIS did not suffer any injury from the  
17 purchase of the securities.

18 There are also cases that we've cited that says,  
19 look, just because the claims are assertable by more than  
20 one entity doesn't mean that the claims are property of the  
21 estate, particularly in -- cite to Seven Seas Petroleum,  
22 where they said, "We also wish to dispel any notion that a  
23 claim belongs to the estate or is otherwise only assertable  
24 by the trustee merely because it could be brought by a  
25 number of creditors instead of just one."

1           And here, there is something, I think, that's been  
2           a little bit overlooked, because of the focus on customer  
3           claims. We all know that, in this case, any distributions  
4           are going to be made to the customers, and it's very  
5           unlikely that the trustee will cover sufficient funds to pay  
6           all customer claims in full.

7           However, there's a whole other class of -- or --  
8           or classes, perhaps, of creditors in this case who would not  
9           be part of the class action. We've got the window washers,  
10          the vendors, the landlords of the world, who clearly weren't  
11          purchasers of the customer claims, but are creditors  
12          nonetheless in this estate.

13          So, when you tie all that up, it's clear that  
14          St. Paul does not transform what otherwise would not be a  
15          trustee claim into a trustee claim, and that's sort of where  
16          -- brings me into the Fox and Marshall claims, because that  
17          was heavily premised on the fact that -- and -- and -- and  
18          findings that were made -- that the actions there, the  
19          claims there were essentially -- you -- you label them  
20          different, but they're essentially fraudulent conveyance  
21          claims.

22          Here, it's completely different. They're -- the  
23          St. Paul weighed heavily in the Fox and Marshall decisions,  
24          because similar -- it -- it -- it was all premised on the  
25          estate sharing the same claim. Here, we simply don't have

1 that, and so, the Fox and Marshall decisions are really,  
2 while interesting and tangentially related, not controlling  
3 here.

4 THE COURT: Of course, the trustee --

5 MR. SCHMIDT: And the last thing --

6 THE COURT: -- argues quite the opposite.

7 MR. SCHMIDT: I -- the trustee argues to the  
8 opposite.

9 THE COURT: The trustee even argues that your  
10 whole securities argument is something that is akin to the  
11 emperor having no clothes.

12 MR. SCHMIDT: Well, that, I respectfully submit,  
13 is -- is --

14 THE COURT: And that it comes about based upon the  
15 experience with the Fox/Marshall litigation. And, by the  
16 way, as I understand it, same counsel involved in  
17 Fox/Marshall is sitting alongside you here in this case.

18 MR. SCHMIDT: Yes, same counsel. I -- I wasn't  
19 involved --

20 THE COURT: But these arguments weren't advanced  
21 in Fox/Marshall, either, although, apparently, they're not  
22 different now. The passage of time hasn't changed, so the  
23 arguments are an outgrowth of a reaction to how the  
24 litigation went in Fox/Marshall.

25 MR. SCHMIDT: Well, I think it's -- it's a

1 different claim here, and, you know, the Fox/Marshall --

2 THE COURT: Well, that's -- that's the beauty of  
3 in hindsight and trying to get around whatever litigation  
4 has already operated, based upon the same set of facts.  
5 Facts haven't changed.

6 MR. SCHMIDT: The same -- facts haven't changed,  
7 Your Honor.

8 THE COURT: Fox/Marshall and -- and now. Only  
9 Picower has morphed into being the control person for Bernie  
10 Madoff. I wonder if -- how Bernie Madoff would react to  
11 that if we had him here today.

12 (Laughter)

13 MR. SCHMIDT: I'm not sure how he would react to  
14 that. He may throw up his arms and say --

15 THE COURT: I don't think he gives credit to  
16 anybody but himself for what happened.

17 (Laughter)

18 MR. SCHMIDT: He -- he -- he may --

19 THE COURT: Go ahead.

20 MR. SCHMIDT: He may very well think, yes, Picower  
21 was controlling me, or he may say that, but God knows what  
22 he would say, Your Honor.

23 But, to address Your Honor's concerns, while we do  
24 have common counsel here, it's not a common plaintiff. The  
25 claims are different. Clearly, the law is that securities

1 law claims are not property of the estate. When I looked at  
2 it -- and I wasn't involved in the Fox and Marshall  
3 litigation. When I looked at it --

4 THE COURT: You had an "aha" moment.

5 MR. SCHMIDT: Huh?

6 THE COURT: You had an "aha" moment, when you  
7 looked at it.

8 MR. SCHMIDT: To -- to borrow something from one  
9 of the -- the TV commercials, I think -- I wouldn't quite  
10 call it an "aha" moment, but I did look at it, and I said,  
11 "Well, these claims are completely different," because those  
12 claims could be closely -- so closely related to the trustee  
13 claim so as to really be the same claim. They were seeking  
14 the same money. It was the same \$7.2 billion.

15 Again, I go back to the fact that our -- the --  
16 the allegations in our complaint of the fraudulent transfers  
17 are merely an illustration of the control that -- that  
18 Picower had. These are different duties. They're different  
19 plaintiffs. Whether or not the suit is ultimately  
20 successful, I would submit, is really a question for the --  
21 for the trial court in -- in that action, should we be  
22 permitted to proceed.

23 I would note, however, Your Honor, that our  
24 proceeding with that action really has no -- no bearing on  
25 what the trustee can and can't do in this -- in this court



1 with this case as a whole. The trustee said, well, you  
2 know, it'll make it more difficult for us to -- to settle  
3 claims. We don't -- we're not aware of any other defendant  
4 in any adversary proceeding the trustee has made where --  
5 where you could argue with a straight face that they somehow  
6 controlled the debtor. There's no 20(a) liability. So, at  
7 best, it's a hypothetical concern.

8 And then, last but not least, Your Honor, the  
9 settlement, the \$7.2 billion -- again, we're not trying to  
10 attack that \$7.2 billion settlement. Kudos to the trustee  
11 for -- for bringing that in.

12 Rather, it's -- it's now final. The appeal of the  
13 government forfeiture order has been dismissed. It's a  
14 final order. The settlement has become final, and that  
15 money should be coming into the estate.

16 We're not looking to attack that. It should have  
17 no desultory defect -- or effect on the trustee's settlement  
18 of other actions.

19 Also, because the settlement is now final, there's  
20 really -- and -- and this goes back to Your Honor's decision  
21 in Cohmad in the Jaffe case. There's nothing left -- left  
22 to administer in this -- in this piece.

23 The settlement's final. The estate's gotten all  
24 the money that were transferred out back in, and, as I said,  
25 the claims are different. The claims are not duplicative.

1 They're not derivative. The case law says that, and so, we  
2 respectfully request that Your Honor issue an order stating  
3 that they are not duplicative of derivative.

4 THE COURT: With respect to the Cohmad matter,  
5 that's not applicable in this case at all. That case turned  
6 on the -- the preservation of jurisdiction and the  
7 settlement documents, and there's a Supreme Court case,  
8 author, Scalia, which really informed this Court's position  
9 on Cohmad. It is totally different and not -- not  
10 supportive of your claim here today.

11 MR. SCHMIDT: We had picked up on it, Your Honor,  
12 because of the -- the -- the arguments that the trustee had  
13 made, but, clearly, Your Honor was here, and Your Honor  
14 ruled on it. I -- I wasn't sitting here. I -- I only know  
15 what I read. So we'll -- we'll leave it at that,  
16 Your Honor.

17 MR. SHEEHAN: When I went to law school, first  
18 year, I had a professor who said to me, "You know, when you  
19 have a case where the law's against you and the facts are  
20 against you, the first thing you try to do is change the  
21 law," and that didn't work out so hot here. As Your Honor  
22 has indicated, Fox has been affirmed. Judge Koeltl found  
23 that the injunction Your Honor entered initially in this  
24 case was appropriate. I won't recite all the reasons why.

25 So what do we do then? Can't change the law.

1 Let's change the facts. Let's create a security out of  
2 whole cloth, a security called B-L-M-I-S security, that,  
3 until the advent of this proceeding, had no existence in the  
4 last three-and-a-half years of this Bankruptcy's Court's  
5 overseeing of this case. Never happened. Never existed.

6 The 703 account, the slush fund created by Bernie  
7 Madoff all of a sudden morphs into -- I have to read it -- a  
8 commingled discretionary securities trading account. I  
9 don't know where that comes from. Doesn't exist. Never  
10 did. Never was what they were doing.

11 What it was was money in, money out. There was no  
12 trading going on. There was no account utilized by him. As  
13 a matter of fact, it wasn't even the nominated at  
14 15(c)(3)(3) account, which it would have to have been, if it  
15 was being used to buy and sell securities.

16 So factually, there's no basis for any of this,  
17 but that -- more to the point is this. What it really  
18 demonstrates is is that what we have here, again, is the  
19 same attempt to end-run Your Honor's decision on net equity,  
20 as happened in the earlier case, and, as Judge Koeltl  
21 pointed out, was exactly what was happening there is  
22 happening here, too.

23 Why? Because what we're dealing with here is,  
24 yes, we have different plaintiffs, but they're the same.  
25 They both filed customer claims. One of them actually was a

1 net loser. The other was a net winner, not dissimilar from  
2 Fox/Marshall.

3 They both filed claims, not as shareholders, which  
4 is what they're now alleging they are, but they are, in  
5 fact, customers, customers who sought to invest with Bernie  
6 Madoff and, unfortunately, fell victim to his fraud. They  
7 are, therefore, no different than Fox and Marshall, and,  
8 while my adversary suggests that this 20(a) allegation is  
9 somehow new and creates something different, Your Honor will  
10 recall that what they were actually arguing in Fox/Marshall  
11 was exactly that they lost their investment income. Does it  
12 sound familiar?

13 It sounds just like somebody suing for securities  
14 fraud. They lost their investment income, and they weren't  
15 looking to get the 7.2, at least they morphed into that, as  
16 well. They said, "No, we want money beyond the 7.2." Well,  
17 all of those changes of positions by Fox and Marshall were  
18 unavailing, just as they should be unavailing here.

19 The premise that Your Honor utilized to bash in  
20 the relief that we received in Picowers (sic) all are still  
21 intact today, all -- what we have before us is a derivative  
22 claim, clearly. It's not just simply that -- and we do have  
23 this -- that every allegation of substance in their  
24 complaint was copied from our complaint.

25 I'm starting to think they're -- maybe we should

1 go back and notice quiddy (ph). But, in any event, they  
2 take our entire complaint and copy it, and that is all the  
3 wrongdoing --

4 THE COURT: You never copyrighted your complaint.

5 MR. SHEEHAN: I know. What they're -- you know,  
6 that -- that, well, so it's going nowhere, Your Honor. But,  
7 in any event --

8 (Laughter)

9 MR. SHEEHAN: I don't think that's going to  
10 happen.

11 But the point is is that they -- they copy the  
12 entire complaint, and that's what they did in Fox, and, in  
13 Fox, Your Honor and Judge Koeltl both found that, clearly,  
14 what that demonstrated was is that their claims were  
15 derivative of the same activities that we were alleging as  
16 the trustee, and what does that mean?

17 What that means is -- now, I'm not going to  
18 belabor this too long, Your Honor, but it demonstrates that  
19 this is a generalized claim. This is a claim that belongs  
20 to every one of the people who are claimants in this case,  
21 and St. Paul teaches us that. That St. Paul teaches us  
22 that, when there's a generalized claim, it's brought by the  
23 trustee, and the only way we're going to be able to protect  
24 that is for Your Honor to utilize the injunctive power of  
25 this Court.

1 That's why we have the automatic stay. That's why  
2 we have 105. The only way to protect a trustee's ability to  
3 do that and do whatever he's supposed to do is to enjoin  
4 others from engaging in the activity that my colleagues are  
5 trying to do here.

6 My colleagues also mentioned Seven Seas and a  
7 whole litany of other cases. As Your Honor has pointed out,  
8 all those cases were available to Fox and Marshall. All  
9 those cases were reviewed by Your Honor, and all of those  
10 cases were reviewed by Judge Koeltl, and all of them soundly  
11 rejected for the proposition that there was an independent  
12 claim that was orbiting around the Fox/Marshall allegations.

13 It's the same way there is no independent claim  
14 here. There should, therefore, be the same result, a  
15 rejection of those line of cases as controlling here and  
16 that the judge -- judge's decision in -- in -- by  
17 Judge Koeltl is the one that we should be following here  
18 today.

19 One -- one last point I would like to make, Your  
20 Honor, and that is is that the injunction -- and I think  
21 it's very, very important point that, I think, Judge Koeltl  
22 made and, I think, Your Honor made it, as well, and that is  
23 this. The injunction was part of the bargain here. \$7.2  
24 billion -- closure was required.

25 We were not going to subject the Picower

1 defendants to multiple lawsuits derived from the same set of  
2 facts and circumstances that resulted in that settlement.

3 It was a very critical and important part of the settlement.

4 Judge Koeltl did a fine job of outlining that in  
5 detail, and I know Your Honor is well-aware of it, and I  
6 think it's a very important element here. Yes, the  
7 settlement itself was extraordinary. It's beyond the  
8 standard or reasonableness, but, just as important is that  
9 the injunction be part and parcel of that to give the relief  
10 that was bargained for and they're entitled to.

11 Thank you, Your Honor.

12 MR. SCHMIDT: Thanks, Your Honor. I'll be brief.

13 My colleague mentioned that security was created  
14 out of whole cloth. Respectfully, Your Honor, that's --  
15 that-- that's not an accurate statement, but regardless,  
16 that really goes to the merits of the underlying lawsuit,  
17 not whether the claim is duplicative or derivative.

18 The lawsuit will stand or fall on its own. The  
19 allegation and the proof will stand and fall on its own,  
20 whether there is a security or whether there's not a  
21 security.

22 The fact that co-counsel also was co-counsel for  
23 other plaintiffs in a -- who are also seeking to sue the  
24 same defendants should not prejudice this claim and this  
25 plaintiff. It's simply is -- is not what a decision should

1 be based upon.

2 As we say over and over again, the fact that  
3 there's some common facts, you have common defendants  
4 doesn't render a claim which the trustee has no standing to  
5 assert to be derivative. There's -- there's ample case law  
6 on that.

7 It is clearly not generalized. There are hundreds  
8 of other creditors, which the trustee points to or -- or  
9 reported in his -- his last report who would not be members  
10 of the class. They were the vendors and -- and other types  
11 of -- of creditors who were not customers.

12 The fact that the class action plaintiffs may be  
13 -- are -- are customers, as well doesn't render this somehow  
14 the trustee's province, and the -- and -- and the fact that  
15 the injunction was part of the bargain that he drove with  
16 the settlement -- we have no quarrel with that. Our  
17 argument is that the injunction does not bar us. It's not  
18 duplicative and not -- and not derivative. To -- to hold  
19 otherwise would be to expand what that injunction says, and  
20 I don't believe that that was what was bargained for or --  
21 or what that was the intent.

22 MR. STONE: Your Honor, may I address the Court  
23 just for one second?

24 THE COURT: Sure.

25 MR. STONE: The Court's talked about the fact that



1 I am common counsel. I think that's largely irrelevant.

2 This is a separate federal securities claim.

3 THE COURT: Your co-counsel has already stated  
4 that.

5 MR. STONE: No, Your Honor.

6 THE COURT: Do you have anything to add?

7 MR. STONE: Yes, I do. There is an independent  
8 duty here that my counsel is not addressing. Section 20(a)  
9 sets up a duty for a control person, a federally-created  
10 right, a federally-created duty that's independent of the  
11 state law claims that we brought. That's the action we're  
12 bringing.

13 The Picowers had a duty to supervise, monitor,  
14 report on, and make sure that BLMIS was operating correctly.  
15 I've been a securities lawyer for 30 years. This is a very  
16 solid 20(a) claim.

17 Picower controlled the day-to-day operations of  
18 this entity. He made entries into the books of record that  
19 were false. He took out money on a regular basis and  
20 treated it as a piggy bank. It's not uncommon to have two  
21 control persons, both Madoff and Picower for the control  
22 persons.

23 THE COURT: Well, that set of facts or that  
24 argument -- there will be many more than two.

25 MR. STONE: I -- I'm unaware of any other, Your

1 Honor. Only aware of two that had that level of control.

2 THE COURT: Well, maybe you ought to take a look  
3 at all the litigation that's going on --

4 MR. STONE: I've seen that, but I don't believe  
5 they had that level of control, Your Honor.

6 THE COURT: All right. Thank you, counsel.

7 MR. STONE: But there is an independent duty here.

8 THE COURT: Is there anything else?

9 (No audible response)

10 At the risk of redundantly -- and even, that's a  
11 bad chip-off -- quoting Yogi Berra, this, again, is, again,  
12 a déjà vu all over again. The class action plaintiffs here  
13 are, indeed, using inventive pleading, which essentially is  
14 to side-step the automatic stay and the Picower injunction,  
15 and, yes, I do find that the litigation and the law that was  
16 set forth in Fox/Marshall applies robustly here.

17 I am going to deny the request for relief here,  
18 and I will issue an opinion with respect to the denial,  
19 either today or tomorrow.

20 UNIDENTIFIED SPEAKER: Thank you very much,  
21 Your Honor.

22 THE COURT: I also find it --

23 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

24 THE COURT: -- interesting that, just minutes  
25 before I came out here, the 2nd Circuit dismissed the

1 Fox/Marshall matter.

2 UNIDENTIFIED SPEAKER: Good news.

3 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

4 THE COURT: Thank you.

5 (Whereupon, these proceedings were concluded at 11:38

6 AM)

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I N D E X

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C E R T I F I C A T I O N

I, Nicole Yawn, certified that the foregoing transcript is a  
true and accurate record of the proceedings.

Nicole Yawn

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Date: June 20, 2012